IN THE MATTER OF THE APPLICABILITY OF THE PUBLIC SERVICE VEHICLE ACCESSIBILITY REGULATIONS 2000 TO RAIL REPLACEMENT BUSES AND COACHES

PROVISIONAL ADVICE

I. INTRODUCTION

1. I am asked to advise the Office of Rail and Road ("**ORR**") on the question of whether the Public Service Vehicle Accessibility Regulations 2000 apply to "rail replacement services" (buses or coaches) which are provided by train operating companies (known as "**TOCs**") in the event of planned or unplanned disruption to train services.

2. I am instructed that often TOCs enter into contracts with third party bus and coach operators to provide a replacement to their normal rail service (or part thereof) on the TOCs' behalf. Some TOCs may also own and operate their own vehicles. Rail replacement services ("**RRS**") can encompass a variety of different types of service such as:

    a. a planned bus or coach to replace part of a rail route during e.g. engineering works, stopping at various stations on the route at specified times. I am instructed that generally "planned" services are those which are included in that day's timetable[1]. Generally, these are advertised in advance.

    b. an unplanned bus or coach provided in cases of last minute failure or disruption on the line (e.g. signal failure or an emergency weather event). These will not be advertised in advance because of the last minute nature of the events.

3. This issue has arisen in the context of the ORR's recent consultation process on their Accessible Travel Policy ("**ATP**") guidance. The ORR decided to re-consult on certain sections of this policy, namely sections A4 (Alternative accessible transport) and A6 (Delays, disruption to facilities and services, and emergencies). Before doing so, it sought my advice on this legal issue.

[1] I understand that the cut-off for including a revision to a day's timetable is 10pm the night before.

4. I provided a provisional version of this advice dated 26 September 2019 and this was published by the ORR. This advice is now final and takes account of certain additional issues that were helpfully raised by stakeholders following the publication of my provisional advice.

5. I have included a summary of this advice in plain English at the end of the document.

II. ISSUES

6. The issues on which I am asked to advise are:

    a. Do the requirements of the Public Service Vehicle Accessibility Regulations 2000 apply to rail replacement buses and coaches?
    b. If so, in what circumstances? Does this depend on whether the service is provided in response to planned or unplanned disruption?
    c. Upon whom does liability for the criminal offence of contravening those regulations under section 175 of the Equality Act 2010 lie?

7. The answer is to be found in a set of interlinked legislative provisions. For ease of reading, I have put these provisions into an Appendix rather than setting them out in full here.

III. ADVICE

i) Public Service Vehicles

8. The Public Service Vehicle Accessibility Regulations 2000 (**"the Regulations**") are made pursuant to the enabling power in section 174 of the Equality Act 2010 ("**the EA"**). This provides that the Secretary of State may make regulations for:

    "(1)…*securing that it is possible for disabled persons:*
    (a) To get on to and off regulated public service vehicles in safety and without unreasonable difficulty (and in the case of disabled persons in wheelchairs, to do so while remaining in their wheelchairs), and
    (b) To travel in such vehicles in safety and reasonable comfort."

9. The purpose of the Regulations is thus to ensure that all "*regulated public service vehicles*" are accessible, safe and comfortable for disabled persons including wheelchair users.

10. A "regulated public service vehicle" is a public service vehicle expressed to be covered by the Regulations: s 173. A "public service vehicle" itself covers a vehicle which (s 174(3)):

a. is adapted to carry more than 8 passengers, and
b. falls within the definition of a public service vehicle for the purposes of the Public Passenger Vehicle Act 1981 (**"the 1981 Act**").

11. Under the 1981 Act, s 1(1)(a), a public service vehicle is "*a vehicle adapted to carry more than 8 passengers …used for hire or reward*" (so far as relevant for present purposes).

12. This therefore encompasses any bus or coach hired by a TOC from a bus company, or used directly by a TOC, to carry rail passengers. The question is which of these vehicles are "regulated" by the Regulations.

13. It should also be noted that under s 174(4) the Secretary of State has the power to make regulations which may make different provision as respects the same class or description of vehicle "in different circumstances". Making any such regulations is subject to consultation with the Disabled Persons Transport Advisory Committee and such other representative organisations as the Secretary of State thinks fit: s 174(5).[2] Since my provisional opinion was published, the Secretary of State has exercised this power both in respect of school transport and RRS. However, these are subsequent developments which do not affect the legal issue on which my advice was originally sought.

ii) The Regulations

14. The Regulations require all "regulated public service vehicles" to have a certificate which signifies compliance with the relevant accessibility requirements set out in the applicable Schedules, and issued in accordance with Parts III to VI of the Regulations – an "accessibility certificate". These requirements cover such matters as wheelchair spaces, boarding lifts and ramps, entrances and exits, gangways, communication devices and lighting.[3]

15. Regulation 3 provides:

(1) *These Regulations apply to public service vehicles of the types described respectively in paragraphs (2) to (7) (a "regulated public service vehicle") in the manner and to the extent set out in this Part.*

[2] The procedure for the exercise of the powers to make subordinate legislation is set out in s 207.
[3] PSVA Regulations, SI 2000/1970, reg 3, Schedule 1 (Wheelchair requirements), Schedule 2 (General Accessibility Requirements buses), Schedule 3 (General Accessibility Requirements for coaches).

16. Thus, paragraphs (2) to (7) set out in turn the details of the single and double deck buses and coaches which are "regulated" i.e. covered by the Regulations[4]. The effect of those paragraphs is as follows:

    a. All single and double deck buses "in use" as at today's date are now required to have accessibility certificates i.e. to comply with the Regulations (all the historic date restrictions now having passed): see regulation 3 (2) – (5).
    b. From 1st January 2020, all single or double deck coaches "in use" will also be required to have a certificate; many newer coaches are already covered, but the exemptions for older coaches[5] previously in place will expire as at that date: see regulation 3(6)-(7).

17. Thus, although certain older coaches are not currently "regulated", all buses and coaches[6] will be required to have an accessibility certificate from 1st January 2020 if they fall within the definition of "in use".

iii) Local or scheduled, or exempt

18. The phrase "in use" means "*the regulated public service vehicle is being used to provide either a local service or a scheduled service":* regulation 3(9). Thus, a bus or coach is required to comply with the Regulations if it is:

    a. being used to provide a local *or* scheduled service; and

    b. not covered by a relevant exemption in regulation 4[7]. The only such exemption which appears to be capable of applying to rail replacement buses or coaches, is regulation 4(1)(f). That is, a vehicle first used 20 years ago, which is not used to provide a local or scheduled service for more than 20 days in any calendar year: the "**20 days' rule**".[8]

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[4] A bus means "*A public service vehicle designed and constructed for the carriage of both seated and standing passengers which is of category M2 or M3 (as defined in Annex II(A) to the 1970 Directive) and has a capacity exceeding 22 passengers in addition to the driver*". The definition of coach is identical save that all passengers must be seated: see regulation 2(1).

[5] See Appendix; in summary, coaches first used before December 2000 or manufactured before 1 Oct 2000 are not required to have a Schedule 3 certificate until 1st Jan 2020, and coaches first used before 1st January 2005 or manufactured before 1st October 2004 are not required to have a Schedule 1 certificate until 1st Jan 2020. First-used is defined in regulation 2.

[6] i.e. a bus or coach covered by the relevant definitions of bus and coach set out in regulation 2 and quoted in footnote 3 above.

[7] See Appendix.

[8] One consultee suggested that regulation 4(1)(e) could also be relevant (i.e. where the vehicle is "*used by or for the purposes of a minister of the Crown or government department…*"). I do not consider that it is relevant because the vehicle is not being used by or for the purposes of a minister of the Crown or government department.

What is a "local service"?

19. A local service is "*a service, using one or more public service vehicles, for the carriage of passengers by road at separate fares*:" s. 2 of the Transport Act 1985,[9] subject to the list of exclusions in s. 2(4), and the 15 mile exception in s.2(2).[10] It is therefore a relatively broad definition, subject to the terms of the various exclusions.

20. The list of exclusions in s. 2(4) (see extract in the Appendix) can be summarised as follows:

    i. Every vehicle providing the service is doing so pursuant to a permit under s 19 of the 1981 Act (s 2(4)(b)). Section 19 relates to educational and other non-profit organisations and is thus of no relevance to rail replacement services; or

    ii. The conditions set out in Part III of Schedule 1 to the 1981 Act (trips organised privately by persons acting independently of vehicle operators etc) are met in respect of each journey made by the vehicles. As that title indicates, these conditions relate to private trips and are not all satisfied in the case of a rail replacement service.[11]

21. The other exclusion is in relation to journeys of 15 miles or more: see s.2(1)(b), (2) and (3). These provisions can be summarised as follows:

    a. a service will not be local (i.e. "**non-local**") if, for every passenger, the distance between the beginning (A) and end (B) of their journey measured in a straight line is 15 miles or more (except in an emergency); and/or

    b. some point on the route between A and B is 15 miles or more from either A or B (e.g. where A and B are in fact closer than 15 miles, but the route between them is 15 miles miles or more).

[9] See definition of "local service" in regulation 2 which refers to that provision.

[10] It should be noted for the sake of completeness that "local services" which are rail replacement services are not subject to the requirement to be registered with the traffic commissioner: see s. 6(1) and (1D) of the Transport Act 1985. The Regulations do not specify that only registered local services are included; they refer to all "local services" which therefore in principle includes rail replacement services.

[11] See Appendix in full; for example, paragraph 5 requires that the arrangements for the journey must have been made otherwise than by a person receiving any remuneration for the arrangements i.e. on a voluntary basis, which is plainly not satisfied in a commercial transaction such as those with which we are concerned. Similarly, paragraph 7 provides that all passengers must be carried to, or to the vicinity of, a particular destination or, in the case of a tour, be carried for the greater part of the journey: again this is very unlikely to be the case with the vast majority of services (which will have a number of stops).

22. Thus, every passenger on the service must be travelling 15 miles or more in distance between their stops for the service to be non-local. My reading of this provision is that it means that each *stop* on the service has to be 15 miles apart for a service to be deemed non-local (rather than this depending on when each passenger got on or off each time the bus runs). This gives practical effect to the words used.

23. Subsection (3) provides that where parts of the service satisfy the distance condition(s) and parts do not, such services can in effect be divided into part local and part non-local. An example of this might be where a long-distance coach route (e.g. London to Oxford) has some initial local stops (e.g. Golders Green and Victoria) but then becomes a non-local service because the last London stop and Oxford stops are more than 15 miles apart.

24. However, in practical terms, subsection (3) is unlikely to have an impact on the need for any vehicle providing a rail replacement service to comply with the Regulations. If the service starts out (as in the above example) or ends up as "local", it will have to be provided in a vehicle which complies with the Regulations, even if it later becomes non-local. (Moreover, a rail replacement service which is non-local is likely to fulfil the definition of scheduled in any event; so one way or another will have to comply with the Regulations: see further below).

25. Thus, in summary:
    a. a bus or coach service which has all its stops less than 15 miles apart will be "local".
    b. A service which has all its stops 15 miles or more apart will be non-local; and
    c. A combination service can be part local and part non-local, but for practical purposes, this will still mean that it has to comply with the Regulations.

Carriage by road at separate fares

26. The remaining issue therefore is whether a rail replacement service falls within the meaning of the phrase "*a service for carriage of passengers by road at separate fares*" (s. 2).

27. My view is that rail replacement services do fall within the scope of these words, although there is no direct authority I have found which decides the point one way or another in this specific context. Nonetheless, I have reached this view based on what I consider to be the correct construction of the statutory language in its proper context and by applying the relevant case law.

28. The first issue is whether a rail replacement service is "*a service for carriage of passengers by road*," despite the fact that customers intend to travel by rail. My view is that a rail replacement service is a service for carriage "by road" (as either a planned or unplanned alternative to travel by rail). The possibility of an alternative service by road being provided as part of the ticket price is envisaged expressly in the National Conditions of Travel, conditions 27 and 28 (Rail Replacement Services)[12]. It is a service which is encompassed within the fare paid by the passenger to the TOC when the rail ticket is purchased. Although, as one TOC consultee pointed out, condition 27.1 provides only that it "may be necessary" to provide rail replacement services rather than providing an absolute right to any such service, it seems to me that where such a service is provided, the passenger's ticket entitles them to travel on that service.[13]

29. Moreover, the following definition of a rail replacement service in related legislation is consistent with this construction:

"…a service for the carriage of passengers by road provided temporarily in place of the whole or part of any service for the carriage of passengers by railway that has been temporarily discontinued, reduced or modified."[14]

30. Further, this interpretation follows from the statutory language. The definition of a local service in section 2 expressly incorporates the meaning of "fares" set out in section 1 of the 1981 Act, and in particular s 1, subsections (5)(b), (c) and (6).

31. Section 1(5)(b) and (c) provide as follows:

> *(b) a payment made for the carrying of a passenger shall be treated as a fare notwithstanding that it is made in consideration of other matters in addition to the journey and irrespective of the person by or to whom it is made;*
>
> *(c) a payment shall be treated as made for the carrying of a passenger if made in consideration of a person's being given a right to be carried, whether for one or more journeys and whether or not the right is exercised.*

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[12] The 2019 version https://www.nationalrail.co.uk/National%20Rail%20Conditions%20of%20Travel.pdf Condition 27.1 " *From time to time, it may be necessary to replace a train service with a bus or coach. In most cases this is planned in advance (due to engineering work to maintain or improve the rail network for instance), but sometimes such changes may be required at short notice (due to emergency engineering work).*" For completeness, Condition 28.2 states "*Where disruption prevents you from completing the journey for which your Ticket is valid and is being used, any Train Company will, where it reasonably can, provide you with alternative means of travel to your destination, or if necessary, provide overnight accommodation for you*". I note that this latter provision is general whereas Condition 27.1 relates specifically to rail replacement services.

[13] Otherwise, if the rail replacement service were deemed to be free of charge, then it would appear that the TOC would need to reimburse the passenger for the part of their ticket to travel by rail which was not possible.

[14] Bus Service Operators Grant (England) Regulations 2002/1015 regulation 2, as amended. See at §45 below.

32. Thus:

    a. Subsection (5)(b) provides that a fare will be paid even where it is paid for "additional matters" other than the relevant journey by road. Therefore, a service may be one which incorporates both rail and road, as here.

    b. Subsection 5(c) refers to payment being treated as being made, as here, if it is made "in consideration of the right to carried" i.e. by road and whether or not the customer exercises that right. The rail passenger's fare includes the right to be carried by rail and by road where necessary / applicable (where a road service is provided at the election of the train operator). It is thus a service which includes one for carriage by road.

33. In my view, this is also supported by s 1(6) (which is also incorporated by s. 2 of the 1985 Act). That provides that as regards a fare being paid for the carriage of a passenger on a journey by air, "*no part of that fare shall be treated for the purposes of subsection (5) as paid in consideration of the passenger by road by reason of the fact that, in case of mechanical failure, bad weather or other circumstances outside the operator's control, part of that journey may be made by road.*"

34. Thus, where an air fare is paid, it is not to be treated as paid in consideration of a journey by road as an alternative (which may be thought understandable given the distances involved in air travel). However, there is no similar express exclusion for travel by rail; this absence of an exclusion for rail (where there is an express exclusion for air) can be taken to support the interpretation set out above.

35. The second issue is whether passengers pay "separate fares". Each passenger pays for their rail ticket, which, as above, entitles them to carriage by road if and when that service is provided as an alternative to rail travel, including where that service is sub-contracted by the TOC to a third party.

36. In my view, this arrangement does constitute the payment of "separate fares". It is already clear from the above that a rail fare can be a "fare" for this purpose: i) if it is paid in consideration of the right to be carried by road for one or more journeys (s 1(5)(c)); and ii) if it is paid for matters other than a road journey in addition i.e. a rail journey as well as a road journey (s 1(5)(b)).

37. Further, s 1(5)(b) also provides that a "fare" is payable "irrespective of the person by or to whom it is paid." This is important here because it does not matter that the passenger does not

pay the bus or coach company for the road service. S/he is paying a "separate fare" in the sense of an *individual* fare paid to the TOC which entitles the passenger to be carried by road.

38. The phrase "separate fares" denotes the payment of separate amounts by individuals (as opposed to e.g. payment for separate parts of the journey). The phrase had a specific definition in the Road Traffic Act 1930, s 61(2), as follows: *"[w]here persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not"* (emphasis added). [15]

39. This meaning has been applied to the replacement provisions for s 61, namely ss 117 and 118 of the Road Traffic Act 1960, even though the full definition from s 61 was not reproduced therein. Thus, in *Wurzal v Addison,*[16] *Wurzal v Wilson*[17] and *Vickers v Bowman*,[18] the Court found that passengers had paid "separate fares" for their mini-bus journey to work, despite not having paid the driver themselves. They had all made individual payments for their journey in some form or other.

40. In *Wurzal v Addison,* the Court held that this was the case despite the fact that the vehicle was hired at a fixed rate regardless of the number of passengers; each passenger paid an amount (in that case to one of the passengers who paid a set amount to the driver) and that was sufficient. Lord Parker CJ found that the phrase "*a payment is made….irrespective of the person by or whom it is made"* then in s 118 (and now reproduced in s 1(5)(c) of the 1981 Act) meant that:

"..accordingly, if a passenger does pay a sum for carriage, it matters not that payment is made to someone other than the driver or owner of the vehicle."[19]

41. Further, in *Wurzal v Wilson,* a company hired a bus for its employees, the employees paid the company a fare for travel and the company paid the bus driver a set fee for hire. The bus driver argued that no separate fares were payable because they were paid to the company and not the

[15] In *East Midland Traffic Area Commissioners v Tyler,* [1938] 3 All ER 39, the High Court held that three people being driven by a fourth person in his car to and from work, and who paid him a contribution towards petrol and oil at 5s a week, were being carried "at separate fares" even though the payments were argued to be contributions towards costs and not "fares" *per se*. See also *Albert v Motor Insurers' Bureau* [1971] 2 All ER 1345 where this settled definition and the case of *Tyler* was discussed (*per* Lord Cross in particular at p 1367-1368).
[16] [1965] 2 WLR 131 (Divisional Court)
[17] [1965] 1 WLR 285 (QBD).
[18] [1976] RTR 165 (QBD).
[19] At p 143. This passage was cited with approval and applied in *Vickers v Bowman* (above) by Lawson J at p 169.

bus driver; that argument failed (see p 290) on the basis of s 118 of the 1981 Act, as in *Wurzal v Addison* above. This is directly applicable to the facts we are considering here.

42. Accordingly, this case law is relevant to the interpretation of the phrase "separate fares" as it appears in the 1981 Act and the Regulations.[20] As a rule of interpretation, Parliament is assumed to have intended the phrase to continue to have the same settled meaning despite not having repeated the specific definition in the 1960 Act or 1981 Act (or the Regulations).[21]

43. Thus, in summary, a rail replacement service is a service for carriage of passengers by road at separate fares. Individual customers pay the TOC for their own separate tickets and that includes entitlement to carriage by road. It does not matter that customers do not pay the bus or coach provider directly, nor that the rail replacement service is not paid for separately but as part of the whole fare.

44. I have seen a summary of the legal position adopted by a group of TOCs which seeks to adopt the opposite definition of "separate fares", i.e. to the effect that because the TOC pays a single payment to the bus company for the rail replacement service, separate fares are not payable, purportedly by reference to s 1(5)(b) of the 1981 Act. However, for the reasons I have given above, this appears to me to be incorrect when a) the statutory language (including s 1(5)(b)) is properly considered and b) when the definition of "separate fares" is traced through in the legislative history and case law.

Other legislative provisions

45. In addition, there are two pieces of related legislation which further support this conclusion. First, the Bus Service Operators Grant (England) (Amendment) Regulations 2013/2100 which amended the Bus Service Operators Grant (England) Regulations 2002/1015 so as to exclude RRS from the scope of "local services" which could otherwise qualify as eligible bus services under that regime (see regulation 3(3)(i). The definition of "rail replacement service" under those regulations is also of note, and is in my view consistent with the construction adopted above:

[20] I note a point made in the consultation responses is that the case law cited refers to situations where individuals intended to board buses or minibuses, not where they intended to travel by train. However, I do not consider that, taken as a whole and based on the statutory language, this means that the principles set out therein are not analogous or supportive. Moreover, I note that the legislation referred to at paragraph 45-46 below supports the construction I have reached regardless of the intention of the passenger or of the question whether a separate fare is payable by the individual passenger to the bus operator.

[21] See *Bennion on Statutory Interpretation*, 7th ed, Section 199. See the principle explained in *Newbury DC v SSE* [1981] AC 578 at 596 *per* Viscount Dilhorne.

"…a service for the carriage of passengers by road provided temporarily in place of the whole or part of any service for the carriage of passengers by railway that has been temporarily discontinued, reduced or modified."

46. Secondly, the Bus Services Act 2017, s 20, inserted new statutory language in order expressly to exclude RRS from (i) the need to register as a "local service" for the purposes of the Transport Act 1985, s 6 and (ii) the scope of the term "London local service" for the purposes of the Greater London Authority Act 1999, s 179, a term which is itself defined by reference to the term "local service" under the Transport Act, s 2.

47. The fact that Parliament has recently seen fit to amend legislation so as to remove RRS from otherwise falling within the definition of a "local service" for specified purpose strongly implies that Parliament considered that RRS do otherwise fall within that definition. There would have been no need for the amending legislation if RRS were not "local services."

Conclusion on "local services"

48. It follows that any bus or coach providing a rail replacement service is likely to be a "regulated public service vehicle," "in use" as a "local service" and thus covered by the Regulations, unless that service is in fact travelling distances of 15 miles or more between all stops, or unless the service is provided by a vehicle fulfilling the 20 days' rule.

Scheduled service

49. A rail replacement bus or coach service may also (or instead) fall within the definition of a "scheduled service" if it falls within the relevant definition set out in regulation 2 (the definitions section). The definition of scheduled is:

"Scheduled service" means a service, using one or more public service vehicles, for the carriage of passengers at separate fares –

(a) Along specified routes,
(b) At specified times, and
(c) With passengers being taken up and set down at pre-determined stopping points,
but does not include a tour service.

50. The correct approach to "separate fares" has already been addressed above.

51. The issue here is whether a service is provided along a specific route, at specific times, and stopping at pre-determined stopping points. It seems to me that very many rail replacement

services will satisfy these criteria. I note that the summary of the legal advice from the group of TOCs which I have seen so far does not seek to suggest otherwise, other than by reference to the issue of "separate fares" which I have already addressed above.

52. The meaning of "scheduled times" and "pre-determined stopping points" seems to me to be straightforward: in the standard example of a planned service (based on a set of examples which I have seen), a rail replacement bus will be indicated in advance on the TOC's timetable with stops and indicative times provided.

53. The provision of this type of information gives effect to TOCs' obligations under condition 4 of their licences (passenger information). This requires TOCs to ensure that passengers have access to "appropriate, accurate and timely information" including "all relevant information to plan their journeys including, so far as reasonably practicable, the fare or fares and any restrictions applicable." I also understand that it is industry-accepted good practice that timings for rail replacement buses are inputted into Darwin, the industry's timetable system which is used to power station screens, journey planners, websites and applications such as National Rail Enquiries.

54. The meaning of the phrase "along specified routes" is less immediately clear. Does it require the exact roads that the bus or coach will take to be specified (which may be the case with some services, but may not with others), akin to a standard bus route? Or will this criterion be satisfied merely if the direction of the service is specified e.g. from Gatwick Airport to Reading?

55. The Shorter Oxford Dictionary definition of "route" is:

> "*A way, road or course; a certain direction taken in travelling from one place to another*."

56. In the context of buses, the word "route" has been held by the Privy Council to mean *"an abstract conception of a line of travel between one terminus and another, and to be something distinct from the highway traversed",* whereas the highway itself means the physical track along which an omnibus runs.[22] This would suggest that the latter of the two alternatives set out above is to be preferred in this context.

[22] *Kelani Valley Motor Transit Co ltd v Colombo-Ranapura Omnibus Co Ltd* [1946] AC 338 at 345-346 *per* Sir John Beaumont. *"The Commissioner has to work out the routes on which a public transport service is to be provided, and in so doing he may have to specify the highway to be followed by the route since there may be alternative roads leading from one terminus to another, but that does not make the route and the highway the*

57. Similarly, in *Brownsea Haven Properties Ltd v Poole Corpn*[23], the Court of Appeal held that the power for local authorities to make an order for the "route" to be observed by carts, carriages, vehicles and persons, included a power to specify a direction only i.e. one way. This is a different context, but supports the broad construction of "route" as meaning "direction".

58. Overall, therefore, at this stage, I consider that the phrase "specified route" would be likely to be given a broad interpretation and thus cover a route indicated from A to B, without a need for exact roads to be specified.

Conclusions on local, scheduled or exempt

59. In conclusion, it follows that a rail replacement service will fall within the definition of a regulated public service vehicle in use, and thus be required to comply with the Regulations, if it is:
    a. Local and scheduled;
    b. Local only (i.e. non-scheduled);
    c. Scheduled only (i.e. non-local).

60. If it falls within *any* of these three categories, it will be required to comply with the Regulations i.e. have the relevant accessibility certificate.

61. Therefore, the types of rail replacement services which will not be "regulated public service vehicles" "in use" are those services which are non-local (such as long distance services which have at least 15 miles between each stop) *and* which are *also* non-scheduled i.e. do not have scheduled stopping points, times or routes. This would appear to be a fairly unlikely combination, at least for planned services, so far as I am aware.

62. Otherwise, it will only be those services which are otherwise exempt i.e. because the vehicle providing the service satisfies the 20 day rule, which do not need to comply with the Regulations.

(iv) Does it make a difference if the service is planned or unplanned?

63. There is no distinction in the Regulations between planned and unplanned services, as follows from the reasoning set out above. Thus, so long as a service is either "local" or "scheduled" (or both), it will be covered by the Regulations, whether or not it is a last minute service.

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same. In their Lordships' view it is of the essence of a route for which a licence is granted that it should run from one terminus to another."

[23] [1958] 1 All ER 205 (CA) at 210-211 *per* Lord Evershed MR.

64. The situation in which unplanned services *might* nonetheless fall outside the Regulations is where they are non-local services which also fall outside the definition of "scheduled." This could conceivably cover a long-distance service run at the last minute without any scheduled times, for example (see paragraph 57 above) but this seems fairly unlikely, bearing in mind TOCs' passenger information obligations and industry-accepted good practice.

65. In summary, the key criteria are: i) separate fares being paid, which I consider is satisfied for all rail replacement services, and ii) whether a service is *either* local *or* scheduled. If it is local, it does not need to be scheduled in order to fall within the Regulations. If it is scheduled, it does not need to be local. If it falls within the definition of either category, it will be covered by the Regulations.

(v) The criminal offence under section 175 of the EA

66. This is the third issue outlined above: upon whom does the criminal liability fall if a vehicle is used which should, but does not, comply with the Regulations?

67. I should note for completeness that it is not the function of the ORR to enforce this criminal provision in respect of TOCs.

68. Section 175 of the EA provides (as far as relevant for present purposes):
175 Offence of contravening PSV accessibility regulations

(1) A person commits an offence by—
(a) contravening a provision of PSV accessibility regulations;
(b) using on a road a regulated public service vehicle which does not conform with a provision of the regulations with which it is required to conform;
(c) causing or permitting such a regulated public service vehicle to be used on a road.

(2) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(3) If an offence under this section committed by a body corporate is committed with the consent or connivance of, or is attributable to neglect on the part of, a responsible person, the responsible person as well as the body corporate is guilty of the offence.

(4) In subsection (3) a responsible person, in relation to a body corporate, is—

(a) a director, manager, secretary or similar officer;

(b) a person purporting to act in the capacity of a person mentioned in para (a)

(c) in the case of a body corporate whose affairs are managed by its members, a member.

(emphasis added)

69. The Explanatory Notes to the Act provides the following:

Effect

565. This section makes it an offence to fail to comply with the requirements of the regulations or to use or allow to be used on the road a public service vehicle which does not meet the requirements of the regulations. If an offence is found to have been committed by or with the consent of a responsible person, such as a director, manager or company secretary, that individual, as well as the company, is guilty of the offence.

566.The offence is punishable by a fine of (currently up) to £2,500.

Background

567. This section replicates the offence provisions of section 40 of the Disability Discrimination Act 1995.

Example

- A bus has an accessibility feature removed and is subsequently used on a registered service. By using, or permitting the vehicle to be used in this condition, an offence is committed and may lead to the driver and the operator being convicted of the offence and a fine of up to £2,500 being imposed

70. In my view, section 175(1)(c), the offence of "causing or permitting" a regulated public service vehicle to be used on a road, could on its face extend not just to the driver and/or company operating the bus or coach (or its company directors etc: see s 175(3)), but also to the TOC which has contracted for that service to be provided on its behalf.

71. I have not found a decided case on the scope of section 175(1)(c). However, there is case law on the meaning of the phrase "causing or permitting" in related contexts which would indicate that the phrase is broad enough to encompass potential liability on the part of a TOC who contracts for the provision of a service covered by the Regulations on its behalf, but which does not then comply with those requirements.

72. The leading case on the phrase in the road traffic context (s 143 of the Road Traffic Act 1930, the offence of causing or permitting an uninsured motor vehicle to be used) is *McLeod (or Houston) v Buchanan*[24], in which it was held as follows:

"To "cause" the user involves some express or positive mandate from the person "causing" to the other person, or some authority from former to the latter, arising in the circumstances of the case. To "permit" is a looser and vaguer term. It may denote an express permission, general or particular, as distinguished from a mandate. The other person is not told to use the vehicle in the particular way, but he is told that he may do so if he desires. However, the word also includes cases in which permission is merely inferred.

... In order to prove permission, it is not necessary to show knowledge or similar user in the past, or actual notice that the vehicle might be or was likely to be, so used, or that the accused was guilty of a reckless disregard of the probabilities of the case, or a wilful closing of his eyes. He may not have thought at all of his duties under the section."

73. See similarly in *Shave v Rosner* [1954] 2 All ER 280 at 281-282 *per* Lord Goddard CJ: there, it was held in summary that "permits" means giving leave and licence to someone to use a vehicle, whereas "causing" involves a person with authority ordering or directing a person to use it, or using a control or dominance (*per* Hilbery J at 282).

74. Further, in *Wurzal v Wilson* (above, facts summarised), the issue concerned the offence of "causing and permitting" a vehicle to be used without the driver having a public service vehicle licence contrary to the Road Traffic Act 1960 s 134. The defendant driver of the bus was found guilty of having "caused" the vehicle to be used without a licence even though he had no actual knowledge that the employees in question (whom he was transporting) were paying their employer (by whom he had been hired) for the service. If payment was being made, then he required a licence. He was found to have known that he could not carry them without a licence if they were making payments, and he was found to have had good reason to suspect that they were making a payment (because he knew they had previously been taking public transport). The Court held that he should have made inquiries about the issue either with the employees or the company and had not done so. Accordingly he was found to have "caused" the vehicle to have been used without a licence. It should be noted however that the question of the company's liability was not at issue in that case one way or another.

75. Applying these principles to the situation whereby a TOC contracts for the use of a bus or coach on its behalf to provide a service which it knows or ought to know attracts the requirements of

[24] [1940] 2 All ER 179 at 187 (House of Lords) at 187 per Lord Wright

the Regulations (i.e. a local or scheduled bus service), it seems to me that the TOC at least arguably is "causing or permitting" the vehicle to be used on the road. The TOC is requiring the use of the vehicle via its contract, and has a considerable degree of control over the situation in terms of its contractual arrangements. Were it not for the contract for the provision of that service on its behalf, the vehicle would not be used for that purpose on that occasion.

76. In these circumstances, unless the TOC has used at least all reasonable endeavours to satisfy itself that services which fall within the Regulations are going to be provided using vehicles which have accessibility certificates, it seems to me that it will be putting itself at risk at least of criminal liability (whether jointly with the bus providers, or otherwise). The circumstances would have to be clear enough to give rise to such liability (the criteria for local or scheduled services being provided would need to be sufficiently clear in advance) because of the criminal nature of the liability; but this would seem likely in light of the advice given above.

77. There may be a range of ways in which this liability could be limited or eliminated, such as contracting for the provision of accessible vehicles only (unless an exemption applies), and/or requiring the bus / coach company to provide evidence of its accessibility certificates for the relevant vehicles in advance. On the other hand, if a TOC contracts for the provision of such services on its behalf but without making any inquires as to whether those services would be compliant with the Regulations, it seems to me at this stage that it is putting itself at least at risk of criminal liability.

78. There will no doubt be various arguments that could be marshalled in response to an allegation of such liability, such as the fact that the TOC could not control the outcome or the vehicle; however, that is not the same as having taken precautions to avoid that eventuality whether under the contract or otherwise. Moreover, the case law indicates that actual knowledge is not required.

IV. CONCLUSIONS

79. My advice is that the requirements of the Regulations apply to rail replacement buses and newer coaches which are providing local and/or scheduled services, and to all such coaches from 1st January 2020. This is because rail replacement services are providing for the carriage of persons at "separate fares," in my view (which is a prerequisite for being local and scheduled).

80. As to whether a service is "local", a rail replacement service is for carriage by road, even though it is primarily a rail service; any service which has all stops less than 15 miles apart will be

local. As to "scheduled", a significant proportion of rail replacement services would appear to satisfy the definition of scheduled services in addition to, or instead of, being local.

81. Accordingly, subject to the limited exemptions, a significant proportion of rail replacement services will need to comply with the Regulations. The main exemptions are vehicles more than 20 years old which are providing the service for less than 20 days per year, and long-distance services (where all stops are 15 miles or more apart) which are also unscheduled. The scope for these would appear to be relatively limited.

82. Those using and operating the vehicles are thus likely to be in contravention of the criminal offence under section 175 of the EA if they are providing the service in vehicles which do not comply with the Regulations. However, my view is that there is at least a material risk that TOCs who are contracting for the provision of these services could also be caught by the criminal offence by virtue of section 175(1)(1)(c) because they may be "causing or permitting" a regulated public service vehicle to be used on a road without complying with the Regulations.

83. I hope this advice covers all the questions raised in my instructions. Please do not hesitate to contact me if I can be of further assistance.